May 27, 2022

Ms. Shira Perlmutter
Register of Copyrights
United States Copyright Office
101 Independence Ave., SE
Washington, DC 20559

Re: Standard Technical Measures and Section 512 [Docket Number 2022-2]

Dear Ms. Perlmutter:

BSA | The Software Alliance (BSA) appreciates the opportunity to provide feedback in response to the Copyright Office's Notice of Inquiry regarding Standard Technical Measures and Section 512.[1] BSA is the leading advocate for the global enterprise software industry. Our members provide a wide range of offerings, including cloud infrastructure and hosting services, customer relationship management software, human resources management programs, identity management services, cybersecurity solutions, and collaboration software.[2] While their service offerings vary, a unifying characteristic of BSA member companies is that their business models are predicated on licensing and sales of intellectual property. BSA members therefore share the underlying goal of ensuring the Digital Millennium Copyright Act (DMCA) remains fit-for-purpose.

BSA members rely on the DMCA both as rights owners and as online service providers. As owners of copyrighted works subject to high levels of infringement, BSA members utilize the DMCA's takedown provisions to enforce their rights online. At the same time, BSA members

[1] U.S. Copyright Office, Library of Congress, *Standard Technical Measures and Section 512*, 87 Fed. Reg. 25049 (Apr. 27, 2022).

[2] BSA's members include: Adobe, Alteryx, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, CrowdStrike, DocuSign, Dropbox, Graphisoft, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, Prokon, PTC, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

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also rely on the legal certainty afforded by the DMCA's safe harbors to provide a vast array of online services that enable their enterprise customers to thrive. Given our members' experience operating as both copyright owners and service providers, we write today to highlight a few issues for consideration as the Copyright Office develops recommendations to Congress about how to overcome the challenges that have thwarted efforts to develop "standard technical measures" (STMs) as they were envisioned when Section 512(i) was codified. These issues are fundamental to the Office's undertaking and cut across many of the questions posed in the Notice.

Section 512(i) Envisions Consensus Around "One-Size-Fits-All" Technical Measures

In our view, the principal impediment to the development of STMs largely derives from the DMCA's statutory text and its presupposition that the broad range of DMCA "service providers" will be able to accommodate specific technical measures. Section 512(i) conditions eligibility for the DMCA's safe harbor on "service providers" accommodating STMs that have been "developed pursuant to a broad consensus of copyright owners and services providers." Of course, the universe of actors that fall within the DMCA's definition of "service provider" is incredibly vast and includes: (1) mere conduits (e.g., internet access providers), (2) caching providers (e.g., intermediary services aimed at enhancing network reliability and performance), (3) hosting services (e.g., services that store material at the direction of a user), and (4) information location tools (e.g., search engines). The combination of the DMCA's broad definition of "service provider" and Section 512(i)'s requirement that STMs garner "broad consensus" among those services thus implies that there may be technical solutions that that could reasonably be accommodated by at least a meaningful proportion of the diverse range of online services that rely on the DMCA.

Insofar as Section 512(i) requires a "broad consensus" of copyright owners and internet access providers, caching providers, hosting providers, and search engines, it is unlikely that any technical measure will meet the statutory requirements to be considered an "STM." Of course, that shouldn't come as a surprise. As the Copyright Office has noted, such one-size-fits-all approaches are unlikely to be effective "since those measures that are appropriate for

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one category of OSP may be a poor fit for OSPs that feature different kinds of content or perform different functions."[3]

Filtering Technologies are Inappropriate for Most Service Providers

The challenge posed by Section 512(i)'s requirement for "broad consensus" among the diverse universe of DMCA "service providers" is compounded by the fact that technical measures are appropriate for a very narrow class of services. As the Copyright Office has noted, discussions about potential standard technical measures are focused on "filtering/fingerprinting systems" that enable some service providers to proactively monitor network activity to identify potentially infringing activity.[4] While some of the world's largest consumer-facing social media and UGC platforms have voluntarily adopted filtering solutions, such solutions could not be adopted by the vast majority of DMCA service providers, raising technical or legal challenges, or both.

Even within the subset of service providers that rely on the Section 512(c) safe harbor (i.e., "hosting providers") the technical feasibility and appropriateness of filtering solutions varies widely. Section 512(c) covers any service that provides "storage at the direction of a user" (i.e., hosting). Although much of the litigation involving Section 512(c) has involved consumer-facing UGC platforms, the universe of online services that fall within the scope of Section 512(c) is incredibly vast. Indeed, the ability to store content is at the heart of virtually every enterprise B2B cloud offering, from software-as-a-service to infrastructure-as-a-service. For most of these services, the use of filtering technologies would pose significant technical challenges and implicate grave cybersecurity and privacy concerns.

The online services provided by BSA members to their enterprise customers are used overwhelmingly for legitimate purposes and in support of critical business operations. While the use of filtering technologies by UGC platforms can in some circumstances be reasonable, imposing a blanket requirement on enterprise service providers would result in unintended – and potentially catastrophic – impacts. BSA members provide cloud-based tools and services to enterprise customers, including organizations in the healthcare, banking, energy, and defense industries. Given the sensitivity of their customers' data, enterprise cloud service providers design their systems so that they have limited – if any – visibility into the data they

[3] Copyright Office Section 512 Report at 176.
[4] Copyright Office Section 512 Report at 178.

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are hosting and/or processing on behalf of their clients. Imposing a filtering requirement on enterprise cloud service providers – e.g., infrastructure-as a- service providers and platform-as-a-service providers -- would thus require them to reengineer their networks in ways that would create significant privacy and security concerns. It could, for instance, prevent enterprise service providers from offering user-controlled encryption protections that are critical to the security of sensitive data. Such an outcome could place service providers out of compliance with legal and contractual obligations, thus exposing them to potential liability.

Potential Paths Forward

As the Copyright Office considers recommendations to Congress about how the original goals of Section 512(i) can be realized, we urge you to focus on the obstacles highlighted above. STMs have yet to arise because the DMCA casts far too wide of a net in seeking to drive consensus for technical measures that can be accommodated by the wide range of actors that fall within the definition of "service provider." The Copyright Office should recognize that this one-size-fits-all approach to technical measures is no more likely to ever generate the "broad consensus" necessary for a technology to be deemed an STM now than it has been over the past 20 years.

Furthermore, given that the technical measures ultimately at issue are filtering technologies, the Copyright Office should also be guided by its own conclusions in the Section 512 Report regarding the need for careful consideration of their "non-copyright implications."[5] As noted above, the application of filtering technologies raises significant privacy and cybersecurity concerns for many hosting service providers. It is for these reasons that the European Union specifically exempts enterprise hosting providers from technical measures requirements in the recently codified Directive on Copyright in the Digital Single Market.[6] Article 17 of the Directive is a de facto requirement for UGC-oriented services[7] to implement filtering mechanisms to prevent the availability of infringing content. Critically, Article 17 implicitly acknowledges that such a requirement would be inappropriate for the vast majority of online

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[5] Copyright Office Section 512 Report at pg. 193.

[6] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Council Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L. 130) ("DSM Copyright Directive").

[7] The DSM Copyright Directive refers to such services as "online content-sharing service providers," which are designed with a predominant purpose of hosting and providing "public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes." DSM Copyright Directive, article 2(6)

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services. Accordingly, the DSM Copyright Directive's Article 17 requirement applies only to the subset of hosting providers that meet the very narrow definition of "online content-sharing service providers." Notably the definition of "online content sharing service providers" explicitly excludes "business-to-business cloud services," open-source software development platforms, and online marketplaces.[8]

Should the Copyright Office determine legislative changes to Section 512(i) are necessary, we urge you to consider options for more narrowly tailoring the class of services that could be subject to a "standard technical measures" requirement or rulemaking. Rather than focusing on "service providers" generally, the Copyright Office should consider targeting the specific subset of service providers for which filtering requirements may be appropriate and explicitly excluding B2B providers for whom filtering requirements would raise significant concerns. Consistent with the approach in the EU, the Copyright Office should seek to focus Section 512(i) on the limited subset of 512(c) hosting services that pose the greatest risk of online infringement. We urge that any recommendations put forward by the Office differentiate among online services based on a data-driven assessment of the risk such services pose to online infringement. The anecdotal, technical, or theoretical capability of a service or type of service to be used to host infringing content should neither trigger an obligation to implement STMs nor prejudice the availability of a DMCA liability safe harbor.

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BSA appreciates the opportunity to provide feedback on these critically important issues and we look forward to remaining engaged as the Copyright Office considers next steps.

Sincerely,

Christian Troncoso
Senior Director, Policy

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[8] DSM Copyright Directive, article 2(6).

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